

1 ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
2 Michael J. Plonsker (SBN 101235)
3 MJPlonsker@rkmc.com
4 Rex D. Glensy (SBN 198909)
5 RDGlensy@rkmc.com
6 2049 Century Park East, Suite 3400
7 Los Angeles, CA 90067-3208
8 Telephone: 310-552-0130
9 Facsimile: 310-229-5800

10 Attorneys for Plaintiffs
11 HANK AZARIA and HOW TO PICTURES, INC.

12
13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA

15 HANK AZARIA, an individual, and
16 HOW TO PICTURES, INC., a
17 California corporation,

18 Plaintiffs,
19 v.
20 CRAIG BIERKO, an individual,
21 Defendant.

22 Case No. 12-cv-09732-GAF-RZx

23 **PLAINTIFFS' OPPOSITION TO
24 DEFENDANT'S MOTION TO SET
25 ASIDE ENTRY OF DEFAULT**

26 Date: March 4, 2013
27 Time: 9:30 a.m.
28 Courtroom: 740

[Declaration of Michael J. Plonsker in
Support of Plaintiffs' Opposition To
Defendant's Motion to Set Aside Entry
of Default filed concurrently herewith]

TABLE OF CONTENTS

| | |
|--|------|
| | Page |
| I. INTRODUCTION..... | 1 |
| II. STATEMENT OF FACTS | 2 |
| III. DISCUSSION | 5 |
| A. Bierko's Culpable Conduct Led to the Entry of Default..... | 6 |
| B. Bierko Does Not Have a Meritorious Defense..... | 9 |
| 1. Bierko Cannot Own A Copyright In A Voice..... | 9 |
| 2. The Parties Never Had An Agreement Pertaining To The Use Of The Baseball Announcer Voice | 10 |
| C. Plaintiffs will be Prejudiced by Further Delay | 12 |
| IV. CONCLUSION | 13 |

1 TABLE OF AUTHORITIES
2
3

Page

Cases

| | Page |
|--|-------------|
| <i>American Ass 'n of Naturopathic Physicians v. Hayhurst,</i> 227 F.3d 1104 (9th Cir. 2000)..... | 6 |
| <i>Billy Steinberg Music v. Bonin,</i> 129 F.R.D. 488 (M.D.Pa 1990) | 6 |
| <i>Brandt v. American Bankers Ins. Co. of Florida,</i> 653 F.3d 1108 (9th Cir. 2011)..... | 6 |
| <i>Faris v. Enberg,</i> 97 Cal. App. 3d 309 (1979) | 10 |
| <i>Franchise Holding II, LLC v. Huntington Restaurants Group, Inc.,</i> 375 F.3d 922 (9th Cir. 2004)..... | 6, 7, 8, 12 |
| <i>Fritz v. Arthur D. Little, Inc.,</i> 944 F. Supp. 85 (D. Mass. 1996)..... | 9, 10 |
| <i>Hollywood Screenest of Am., Inc. v. NBC Universal, Inc.,</i> 151 Cal. App. 4th 631 (2007)..... | 11 |
| <i>Kingvision Pay-Per-View Ltd v. Lake Alice Bar,</i> 168 F.3d 347 (9th Cir. 1999) | 7 |
| <i>Mann v. Columbia Pictures,</i> 128 Cal. App. 3d 628 (1982) | 10 |
| <i>Meadows v. Dominican Republic,</i> 817 F.2d 517 (9th Cir. 1987) | 6, 7 |
| <i>Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership,</i> 507 U.S. 380 (1993)..... | 12 |
| <i>Richmark Corp. v. Timber Falling Consultants, Inc.,</i> 937 F.2d 1444 (9th Cir. 1991) | 7 |
| <i>Rooks v. American Brass Co.,</i> 263 F.2d 166 (6th Cir. 1959) | 6 |
| <i>Standard Enterprises, Inc. v. Bag-It, Inc.,</i> 115 F.R.D. 38 (S.D.N.Y. 1987)..... | 6 |
| <i>TCI Group Life Ins. Plan v. Knoebber,</i> 244 F.3d 691 (9th Cir. 2001) | 6 |
| <i>Weitzen-Korn v. Lesser,</i> 40 Cal. 2d 778 (1953) | 11 |

TABLE OF AUTHORITIES (Continued)

| | Page |
|--|------|
| Statutes | |
| 17 U.S.C. §101 | 9 |
| 17 U.S.C. §102(a) | 9 |
| U.S. Const. Art. 1 §8 | 9 |
| Rules | |
| Federal Rule of Civil Procedure 12(a)(1)(A)(i) | 2 |
| Federal Rule of Civil Procedure 55(c)..... | 5 |
| Federal Rule of Civil Procedure 60(b) | 6 |

1 I. INTRODUCTION

2 Defendant Craig Bierko (“Bierko” or “Defendant”) has moved to have the
3 default entered against him on December 20, 2012, set aside only after repeatedly
4 being given the opportunity to file an answer, after being given over 2 years to
5 resolve his meritless claim, and after Plaintiffs Hank Azaria (“Azaria”) and How to
6 Pictures, Inc. (“How to Pictures”) (collectively “Plaintiffs”) filed an application for
7 entry of default judgment. Defendant offers no good cause for why his failure to
8 answer or meet court required deadlines should be excused. His motion should be
9 denied and default judgment should be entered.

10 It is apparent from the facts discussed below that Defendant’s real goal is not
11 to defend the claims made against him in the Complaint because he has no defense,
12 but to wreak as much havoc as possible on Azaria, his former friend, who
13 Defendant alleges wronged him. Defendant’s actions demonstrate one thing – that
14 he wants to prevent a prompt resolution of this case so as to interfere with Plaintiffs
15 ability to exploit the Azaria Voice and the Jim Brockmire Character by placing a
16 “cloud” on Plaintiffs’ ownership. Indeed, Defendant made the same dilatory
17 request he makes now - for time to find counsel - on December 17, 2012. This
18 behavior should not be rewarded.

19 Defendant’s excuses for his failure to file an answer within the prescribed
20 timeframe are essentially that he was too busy to deal with this lawsuit, was unable
21 to find counsel to defend him, and did not find out until recently that he could
22 defend himself. And yet, according to Defendant’s own declaration, he was
23 represented by counsel all throughout this period (and for the two years preceding
24 the filing of the Complaint). Defendant fails to explain how he could consider
25 himself unrepresented when he admits that he was represented, why he could not
26 simply ask his own counsel whether he could represent himself, and why his
27 counsel did not advise him that a response to the Complaint must be timely pled.
28 His protestations are implausible, are made in bad faith, and should be refused.

1 Moreover, Defendant makes the conclusory claim that he has a meritorious
 2 defense to this action, but he fails to explain what the contours of this meritorious
 3 defense might be and merely resorts to a boilerplate assertion that he “disputes
 4 Plaintiffs’ factual allegations.” This is insufficient to constitute a meritorious
 5 defense to Plaintiffs’ two claims for declaratory relief. Although Defendant does
 6 assert in his declaration that he “created the property in question during college,” he
 7 does not describe what this “property” actually is. It certainly is not the Jim
 8 Brockmire Character, or the Funny or Die screenplay or video, all of which were
 9 undisputedly created in 2010 without any input by Defendant. Thus, what
 10 “property” does Defendant claim to own? He does not say, but the only possible
 11 answer is the “voice” of a colorful baseball announcer which is not copyrightable
 12 subject matter. Thus, Defendant’s “defense” claim also fails on its merits and is
 13 anything but meritorious.

II. STATEMENT OF FACTS

15 In his motion, Defendant recites a statement of facts that is mostly a work of
 16 fiction. An accurate rendition of the facts is as follows:

17 (a) On November 14, 2012 , Plaintiffs filed the complaint in this action.
 18 The case was originally assigned for all purposes to the Hon. Magistrate Judge
 19 Fernando M. Olguin with the case number 12-cv-09732-FMO. *See* Declaration of
 20 Rex D. Glensy filed in support of Application to Enter Default Judgment (“Glensy
 21 Decl.”), at ¶2. Bierko admits himself that he “became aware of this lawsuit on
 22 November 14, 2012,” the same day that it was filed, i.e., he has known about this
 23 lawsuit for almost three months. *See* Declaration of Craig Bierko filed in support
 24 of Motion to Set Aside Default (“Bierko Decl.”), at ¶3.

25 (b) On November 21, 2012, Bierko was personally served with summons
 26 and complaint. The proof of service of summons was filed with the Court on
 27 December 3, 2012. *See* Glensy Decl., at ¶3.

28 (c) Pursuant to the Federal Rule of Civil Procedure 12(a)(1)(A)(i) Bierko

had 21 days from November 21, 2012, to file a responsive pleading. This period expired on December 12, 2012, (not on December 17, 2012 as Bierko asserts). *See* Glensy Decl., at ¶4.

(d) Defendant's counsel, Craig Jacobson ("Jacobson") engaged in negotiations through and *past* the deadline for Plaintiffs to seek entry of default. *See* Declaration of Michael J. Plonsker in support of Opposition to Motion to Set Aside Default ("Plonsker Decl."), at ¶2. Plaintiffs, through counsel Michael J. Plonsker ("Plonsker"), engaged in these discussions in good faith and were given the impression that Bierko was not interested in settling the matter, but merely in delaying the process so as to prejudice Plaintiffs as much as possible. *See id.* These suspicions were confirmed. On December 14, 2012, the parties exchanged what Plaintiffs thought was an agreed upon settlement agreement ready for execution. *See* Plonsker Decl., at ¶3, Ex. A. Jacobson, on instructions from Bierko, made a last minute request to insert an extra clause in this agreement to which, on December 17, 2012, Plaintiffs initially did not agree. Plaintiffs also warned that a failure to sign the agreement that day would see the litigation proceed immediately through entry of default. *See* Plonsker Decl., at ¶4, Ex. B.

(e) It was on this same day, December 17, 2012, , that Bierko improperly wrote to the Court requesting a 30 day extension "so that he could find an attorney in Southern California," even though for years he had been using the services of Jacobson, a highly prominent and respected entertainment attorney located in Southern California. *See* Plonsker Decl., at ¶6, Ex. C.

(f) However, later that day, Plaintiffs acceded to the change requested by Bierko (and thus the settlement complied with Bierko's demands), and, by email, informed Jacobson of this and requested that Bierko now sign the amended settlement agreement or else entry of default would be sought by December 19, 2012, and litigation would proceed. *See* Plonsker Decl., at ¶5, Ex. D. Plonsker reiterated that Bierko had already been granted an extension (seeing that Bierko's

1 response to the Complaint was due on December 12, 2012), and that Plaintiffs had
 2 been told that Bierko had no intention of responding to the Complaint in any case.
 3 *See id.*

4 (g) On December 17, 2012, and December 18, 2012, Jacobson
 5 communicated more than once to Plonsker that he had asked Bierko to reply to
 6 Plaintiffs' request but had heard nothing from the Defendant. *See* Plonsker Decl.,
 7 at ¶7, Ex. E. It bears repeating, the final settlement agreement complied with all of
 8 Bierko's demands.

9 (h) Thus, on December 19, 2012, Plaintiffs filed a request to the clerk that
 10 default be entered against Defendant Craig Bierko. *See* Glensy Decl., at ¶5. This
 11 request was made after repeated failed attempts by both Plonsker and Jacobson to
 12 get a response from Bierko regarding his intentions and with the warning that a
 13 failure to agree would result in the litigation proceeding.

14 (i) The clerk entered Bierko's default on December 20, 2012. *See* Glensy
 15 Decl., at ¶6.

16 (j) On December 21, 2012, i.e., one day *after* the clerk had already
 17 entered default, Bierko attempted to communicate with Plonsker by phone.
 18 Because Bierko was represented by counsel, Plonsker did not reply directly to
 19 Bierko (as this would have been a violation of the Rules of Professional Conduct)
 20 and referred the matter to Jacobson who then gave his permission for Plonsker to
 21 communicate directly with Bierko. *See* Plonsker Decl., at ¶8, Ex. F.

22 (k) Before Plonsker could respond to Bierko's call, on December 21,
 23 2012, Bierko wrote directly to Plonsker and his colleague Rex Glensy "to request
 24 [that Plaintiffs] set aside the motion to allow [him] at least thirty days to organize
 25 [his] defense." *See* Plonsker Decl., at ¶9, Ex. G. Moreover, Bierko also indicated
 26 that he would "file [his] own motion to set aside [the] entry of default," and to
 27 contact either him or his attorney Craig Jacobson with any response. *See id.*

28 (l) In the reply to Bierko's letter, sent on December 26, 2012, Plaintiffs

1 rejected Bierko's attempts for further delay in light of the fact that counsel for both
 2 parties had been trying to settle this matter for two years, but Bierko's inability to
 3 take "yes" for an answer had made such a settlement impossible. *See* Plonsker
 4 Decl., at ¶10, Ex. H.

5 (m) Nevertheless, as a gesture of good faith, Plaintiffs waited over 30 days
 6 (the amount requested by Bierko) before applying for default judgment. In that
 7 time Plaintiffs heard nothing from Bierko, and neither did the Court: no "counsel"
 8 was substituted into the case by Bierko, no motion to set aside the default was filed
 9 by Bierko, and no entreaties were made by Bierko to finalize the settlement. In
 10 fact, the only action that took place in this time was on January 10, 2013, when the
 11 Court issued an OSC ordering Plaintiffs either to file an application for default
 12 judgment or dismiss the complaint. *See* Plonsker Decl., at ¶11, Ex. I. After the
 13 issuance of the OSC, Plaintiffs still waited a further two weeks until January 24,
 14 2013, to file their application for default judgment to see whether Bierko would
 15 take any of the actions that he stated he would (i.e. hire "new" counsel or file a
 16 motion to set aside the default). He did not.

17 (n) Only after Plaintiffs had filed on January 24, 2013, an application for
 18 default judgment at the behest of the Court did Bierko, on January 30, 2013, finally
 19 decide that a further delay was warranted. In filing his Motion to Set Aside the
 20 Default, Defendant has merely repeated the same excuses that he offered Plaintiffs
 21 and the Court over six weeks earlier without any explanation as to why, six weeks
 22 later, his situation has remained unchanged.

III. DISCUSSION

24 Under Federal Rule of Civil Procedure 55(c), the Court will only set aside the
 25 entry of default upon good cause shown by the moving party. *See* F.R.C.P. 55(c).
 26 In determining whether good cause exists to set aside the entry of default, the Court
 27 applies the following three factors: (1) whether culpable conduct of the defendant
 28 led to the default, (2) whether the defendant has a meritorious defense, and (3)

1 whether the plaintiff will be prejudiced. *See Brandt v. American Bankers Ins. Co.*
 2 *of Florida*, 653 F.3d 1108, 1111 (9th Cir. 2011) (also stating that these factors are
 3 the same as those examined under Federal Rule of Civil Procedure 60(b) to
 4 determine whether a defendant is entitled to relief from default judgment because of
 5 “excusable neglect.”) These three factors are disjunctive, and “the district court [is]
 6 free to deny [relief] ‘if *any* of the three factors [is] true.’” *See Franchise Holding*
 7 *II, LLC v. Huntington Restaurants Group, Inc.*, 375 F.3d 922, 926 (9th Cir. 2004)
 8 (quoting *American Ass’n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104,
 9 1108 (9th Cir. 2000)). Defendant has the burden of showing that any of these
 10 factors favor setting aside the default. *See TCI Group Life Ins. Plan v. Knoebber*,
 11 244 F.3d 691, 697 (9th Cir. 2001).

12 A. **Bierko’s Culpable Conduct Led to the Entry of Default**

13 To prevail on a motion to set aside a default, the moving party must provide a
 14 reasonable excuse for not intervening in the case before a default was issued. *See*
 15 *Meadows v. Dominican Republic*, 817 F.2d 517, 520 (9th Cir. 1987). Excusable
 16 neglect is usually shown in those circumstances where Defendant was not capable
 17 of answering or otherwise responding to the complaint on time. For example,
 18 evidence that a defendant was in hospital during the period in which the complaint
 19 had to be answered was sufficient to constitute excusable neglect. *See Rooks v.*
 20 *American Brass Co.*, 263 F.2d 166, 168 (6th Cir. 1959). Similarly, evidence that
 21 the summons and complaint had been placed in a pile of junk mail was sufficient to
 22 constitute excusable neglect. *See Standard Enterprises, Inc. v. Bag-It, Inc.*, 115
 23 F.R.D. 38, 39 (S.D.N.Y. 1987).

24 However, the motion to set aside the default should be denied where
 25 defendant has notice of the action and *chooses* not to respond as a delaying tactic or
 26 for other strategic reasons such as to prolong settlement discussions. *See e.g. TCI*
 27 *Group Life*, 244 F.3d at 699; *see also Billy Steinberg Music v. Bonin*, 129 F.R.D.
 28 488, 491 (M.D.Pa 1990). A key inquiry into whether a defendant is culpable for

1 not responding to the complaint in time is whether “the defaulting party [has]
2 general familiarity with legal process or [was in] consultation with lawyers at the
3 time of the default” so that it can be inferred that the failure to respond was
4 deliberate, willful, or in bad faith. *See id* at 699 n.6 (citing *Meadows*, 817 F2d. at
5 522). Indeed, the failure by a defendant to answer the summons and complaint
6 notwithstanding frequent chats with his lawyers during the period for answer is
7 clear evidence of culpability. *See Kingvision Pay-Per-View Ltd v. Lake Alice Bar*,
8 168 F.3d 347, 350 (9th Cir. 1999); *see also Richmark Corp. v. Timber Falling*
9 *Consultants, Inc.*, 937 F.2d 1444, 1449 (9th Cir. 1991) (retaining counsel to protect
10 defendant’s interests in other matters is evidence of willful failure to respond to the
11 complaint). Most relevant here, the failure to obtain an order or agreement to
12 extend time to file a responsive pleading is culpable conduct when defendant was
13 on notice that plaintiff would pursue litigation should settlement talks break down.
14 *See Franchise II*, 375 F.3d at 926.

15 Bierko concedes that he was represented by counsel with whom he was
16 repeatedly in touch throughout the whole period in which he was to answer the
17 complaint. To wit, he notes that shortly after he was served, he traveled to Los
18 Angeles and that he was “communicating *with my attorney* via E-mail and phone
19 messages between shots.” *See Motion*, at 9:18-20; Bierko Decl., at 3:5-7. He also
20 states that as a result of the lawsuit “[t]hrough [his] transaction entertainment
21 lawyer [he] engaged in extensive good faith negotiations to settle.” *See Motion*, at
22 5:22-23. Furthermore, Bierko also concedes that nothing in this lawsuit was new to
23 him considering that, as he notes, “[f]or nearly two years [he] has sought a
24 resolution” of this matter. *See Bierko Decl.*, at 6:4-6.

25 Given Bierko’s familiarity with the issues raised in this action and his
26 admitted retention of counsel on this matter “for nearly two years,” it is implausible
27 to accept his assertion that he missed his deadline to respond to the Complaint
28 because he was not able to find counsel in time or because he thought the matter

1 might settle. Bierko is not even holding himself to his own word in that on
 2 December 17, 2012, he assured the Court that he needed 30 days to find counsel
 3 and yet almost double that amount of time has passed and still Bierko claims not to
 4 have counsel (which of course is not true because he has been represented in this
 5 matter) and therefore needs even more time.¹ Considering that he has counsel, this
 6 excuse is patently not credible.

7 In fact, Bierko's excuses merely evidence, if taken at face value, that he was
 8 too busy to deal with this lawsuit. Whether it is because he had to work, *see* Bierko
 9 Decl., at 3:5-7 (which is an eyebrow-raising excuse seeing that most people work),
 10 or because he had to travel for the Holidays on the day the answer was due, *see*
 11 Bierko Decl., at 2:15-16 (another eyebrow-raising excuse seeing that the answer
 12 was due December 12, 2012, a full two weeks before Christmas and three weeks
 13 after Thanksgiving), it is clear that Bierko will say anything to deflect from the fact
 14 that he knowingly (as admitted by him) and willfully (also as admitted by him)
 15 chose not to answer the Complaint.

16 Moreover, Bierko's holding out hope that a settlement would be reached is
 17 not excusable neglect. *See Franchise II*, 375 F. 3d at 926. In *Franchise II*, the
 18 parties engaged in settlement discussions, however, at a certain point, the plaintiff
 19 informed the defendant that "it was proceeding with litigation." *See id.*, at 926.
 20 The defendant, nevertheless, failed to respond to the complaint on time. In
 21 upholding the district court's refusal to set aside the default, the Court of Appeal
 22 noted that if a defendant "has received actual or constructive notice of the filing of
 23 the action and failed to answer, its conduct is culpable." *Id.*

24 Here, like in *Franchise II*, Bierko was repeatedly warned, the last time on
 25 December 17, 2012, that failure to settle the case would result in Plaintiffs seeking
 26 entry of default and pursuing with this litigation. *See* Plonsker Decl., at ¶5, Ex. C.
 27 Bierko admits this several times in his motion papers. *See* Bierko Decl., at 2:15-16,

28 ¹ Indeed, Bierko's motion papers alone are evidence that he has an attorney working for him.

1 3:14-17, 3:20-23, 4:1-2. Thus, because he was fully aware of the consequences of
 2 his inaction regarding both the settlement and his failure to respond to the
 3 Complaint, he is fully culpable for the entry of default.

4 **Bierko Does Not Have a Meritorious Defense**

5 Plaintiffs have requested declaratory relief for the following: (1) that How To
 6 Pictures owns the copyright in the Funny or Die screenplay and the Jim Brockmire
 7 Character; (2) that the voice of a colorful baseball announcer (whether played by
 8 Bierko or Azaria) is not in and of itself copyrightable subject matter, *see* Complaint,
 9 at ¶¶20-23; and (3) that no implied in fact contract was ever created between Azaria
 10 (or How To Pictures), on the one hand, and Bierko on the other, pertaining to the
 11 use of a voice of a colorful baseball announcer (whether played by Azaria or
 12 Bierko) or the use of the Jim Brockmire Character. *See* Complaint, at ¶¶24-27.
 13 Defendant has offered no evidence or law to support his argument that his defense
 14 to these claims is meritorious.

15 1. **Bierko Cannot Own A Copyright In A Voice**

16 It is an axiomatic rule of Copyright Law that only works of authorship “fixed
 17 in any tangible medium of expression” fall within the scope of protection of the
 18 Copyright Act. *See* 17 U.S.C. §102(a). This rule is a constitutional necessity for
 19 without fixation, a work cannot be classified as a “writing” under the Copyrights
 20 Clause of the U.S. Constitution. *See* U.S. Const. Art. 1 §8.

21 A work is not “fixed” under the Copyright Act unless its embodiment in
 22 tangible form is “sufficiently permanent or stable to permit it to be perceived,
 23 reproduced, or otherwise communicated for a period of more than transitory
 24 duration.” *See* 17 U.S.C. §101. Thus, oral presentations that are not themselves
 25 based on antecedent fixations are not afforded copyright protection. *See Fritz v.*
26 Arthur D. Little, Inc., 944 F. Supp. 85, 100 (D. Mass. 1996) (lectures not based on
 27 prior notes are not copyrightable subject matter).

28 Throughout his motion papers, Bierko refers to a certain “property” that he

1 supposedly created during college. *See* Bierko Decl., at 5:20-22. What Bierko is
 2 very careful in not saying is what exactly comprises this “property.” It is clearly
 3 not a screenplay, nor a video, nor a treatment, not even an outline; indeed, it is
 4 nothing that is fixed expression in a tangible form. Bierko himself hints at what
 5 this “property” might be when he claims that he “introduced it to [Azaria] in or
 6 around 1990.” *See* Bierko Decl., at 5:20-21. What is undisputed by Bierko is that
 7 what Bierko “introduced to” Azaria in 1990 was the voice of a colorful baseball
 8 announcer—nothing more. This is a communication of transitory duration akin to
 9 an oral presentation and thus not protectable under Copyright Law. *See Fritz*, 944
 10 F. Supp. at 100.

11 As to the Jim Brockmire Character, and the screenplay of the Funny or Die
 12 video and the video itself (which are all expressions fixed in a tangible form and
 13 thus works subject to copyright protection), Bierko does not allege that he had
 14 anything to do with their creation or ownership because he did not. He simply
 15 asserts ownership over an amorphous “property” to which he gives no shape. He
 16 therefore has no meritorious defense to Plaintiffs’ first claim for declaratory relief.

17 2. The Parties Never Had An Agreement Pertaining To The Use Of
 18 The Baseball Announcer Voice

19 To establish a cause of action for breach of implied-in-fact contract, a
 20 plaintiff must prove the following five elements: (1) that he prepared the work; (2)
 21 that he disclosed the work or the ideas to the offeree for consideration; (3) under all
 22 circumstances attending disclosure, it can be concluded that the offeree voluntarily
 23 accepted the disclosure knowing the conditions on which it was tendered (i.e., the
 24 offeree must have the opportunity to reject the attempted disclosure if the
 25 conditions were unacceptable); (4) use by the offeree; and (5) the reasonable value
 26 of the ideas used. *See, e.g., Faris v. Enberg*, 97 Cal. App. 3d 309 (1979); *Mann v.*
 27 *Columbia Pictures*, 128 Cal. App. 3d 628, 647 n.6 (1982). Although there is no
 28 requirement under California law that the idea be novel or original to state a claim

1 for breach of implied contract, a general or amorphous idea may be deemed to have
 2 *no value* or be considered so well known that the jury could easily conclude that the
 3 defendant's work was independently created. *See, e.g., Weitzen-Korn v. Lesser*, 40
 4 Cal. 2d 778, 791-2 (1953).

5 Moreover, a defendant may be able to prevail *on summary judgment* where
 6 there is no evidence to dispute a defendant's claim of independent creation even if a
 7 plaintiff can prove access and substantial similarity. *Hollywood Screentest of Am., Inc. v. NBC Universal, Inc.*, 151 Cal. App. 4th 631, 649-50 (2007). In *Hollywood Screentest*, the plaintiff alleged that the "Hollywood Screentest" show pitched to
 10 defendants was similar to NBC's show "Next Action Star." *Id.* at 633-34.
 11 Notwithstanding the fact that the plaintiff in *Hollywood Screentest* could show both
 12 access and similarity of the ideas, the Court of Appeal nonetheless granted
 13 defendants' summary judgment motion on the grounds of independent creation. *Id.*
 14 at 649-50. Specifically, the Court found that no disputed issue of fact existed
 15 because the defendants had "successfully shown undisputed evidence of
 16 independent creation by entities unrelated to [the defendant] and unassisted by [the
 17 defendant]." *Id.* at 648.

18 In suggesting guidelines for adjudicating similar cases, the Court explained
 19 that when there exists "clear, positive and uncontradicted evidence" of independent
 20 creation, then a plaintiff's "suspicion . . . imagination, speculation, supposition,
 21 surmise, conjecture, [and] guesswork" would not suffice to create an issue of fact.
 22 *Id.* at 648 (citations omitted). Therefore, uncontradicted evidence of independent
 23 creation "negates any inference that [a defendant] used [plaintiff's] ideas", an
 24 essential element to the cause of action. *Id.*

25 According to Bierko's own declaration, as well as Azaria's declaration
 26 submitted with Plaintiffs' application for default judgment, there was no implied-in-fact
 27 contract relating to the use of the voice of a baseball announcer. First,
 28 Azaria declares that he created his voice in 1983 at the latest and performed it in

1 college. *See Declaration of Hank Azaria in support of Application for Default*
 2 Judgment (“Azaria Decl.”), at ¶¶2-3. This allegation cannot be contradicted by
 3 Bierko because the two did not meet until 1990. *See id.*, at ¶3. As such, even
 4 assuming Bierko’s allegations to be true (which they are not), Azaria’s claim of
 5 independent creation cannot be rebutted by Bierko and thus Bierko’s claim would
 6 fail for this reason alone.

7 Moreover, although Bierko states that he has “witnesses” who can attest that
 8 Bierko “pitched” the voice to Azaria, again, he is necessarily vague as to the
 9 circumstances of this supposed “pitch.” *See Bierko Decl.*, at 5:26-27. This is
 10 because there was no “pitch” as this term is understood in the industry, but rather,
 11 as noted by Azaria, what Bierko calls a “pitch” was nothing more than the two
 12 horsing around and leaving voice mail messages using the colorful baseball
 13 announcer voice. *See Azaria Decl.*, at ¶3. Nothing from these circumstances can
 14 lead to the inference that Bierko shared the voice with Azaria with the assumption
 15 that Azaria could reject hearing it or otherwise communicate to Bierko that he did
 16 not accept the terms under which it was presented. Under the circumstances
 17 present in this case, as a matter of law, no contract can be implied between Bierko
 18 and Azaria and therefore even as to Plaintiffs’ second declaratory relief claim,
 19 Bierko has no meritorious defense.

20 **C. Plaintiffs will be Prejudiced by Further Delay**

21 A motion to set aside a default should not be granted if the plaintiff will
 22 suffer prejudice by reopening the action. *See Pioneer Investment Services Co. v.*
23 Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 395 (1993). Delaying the
 24 resolution of the case has been shown to be enough evidence of prejudice to the
 25 plaintiffs justifying the denial of a motion to set aside the entry of default. *See*
26 Franchise II, 375 F.3d at 927.

27 Bierko has known for some time that Plaintiffs are in the process of trying to
 28 secure financing to develop and produce a live action feature film based on the Jim

1 Brockmire Character. It is well-known in the entertainment industry that an
2 ownership claim by a third party against material being developed (however
3 baseless or frivolous as Bierko's is) is a huge impediment to securing financing
4 because investors are justifiably worried that their investment might be tied up in
5 court for a long time without any chance of seeing any returns. As Bierko
6 concedes, this matter is now at least two years old, and any further delay will cause
7 Plaintiffs significant damage and prejudice in that it is a substantial possibility that
8 potential investors will decide not to invest in the project should this matter be tied
9 up any longer.

10 **IV. CONCLUSION**

11 For the foregoing reasons, Plaintiffs respectfully request that Defendant's
12 motion to set aside the entry of default be denied.

13
14
15 Dated: February 11, 2013

ROBINS, KAPLAN, MILLER & CIRESI, L.L.P.

16
17 By:

18 Michael J. Ponsker
Rex D. Glensy

19
20 **ATTORNEYS FOR PLAINTIFF HANK
AZARIA AND HOW TO PICTURES, INC.**